(22,325)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 139.

WILLIAM H. WINFREE, AS ADMINISTRATOR OF THE ESTATE OF ALBERT E. PHIPPS, DECEASED, PLAINTIFF IN ERROR,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original	Print
Caption	a	1
Names and addresses of attorneys	1	1
Transcript from the circuit court of the United States for the eastern district of Washington	1	1
Caption	1	1
Complaint	2	2
Demurrer to complaint	8	5
Opinion by Whitson, J.	10	7
Order sustaining demurrer	13	8
Stipulation that plaintiff refuses to plead further	14	9
Judgment	15	9
Bill of exceptions	16	10
Demurrer sustained	17	10
Judge's certificate to bill of exceptions	17	10
Assignment of errors	18	11
Petition for writ of error	19	11
Order allowing writ of error	20	12
Writ of error	21	12
Citation and service	23	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1912.

	Original	Print
Bond on writ of error	24	14
Præcipe for record	26	15
Clerk's certificate	28	16
Certificate of clerk of the United States circuit court of appeals to printed record	30	17
Caption to proceedings in United States circuit court of appeals	31	18
Order of submission	32	18
Opinion by Gilbert, J.	33	19
Judgment	38	21
Order staying mandate	39	22
Petition for writ of error	40	22
Order allowing writ of error	42	23
Assignment of errors	43	23
Bond on writ of error	44	24
Præcipe for record	47	25
Clerk's certificate	49	26
Writ of error	50	26
Return on writ of error	52	27
Citation	53	28
Acceptance of service of citation	54	28

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
THE NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant in Error.

Printed Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

Filed Dec. 10, 1908.

F. D. MONCKTON, *Clerk.*

1 *Names and Addresses of Attorneys of Record.*

B. C. Mosby, #324 Fernwell Building Spokane, Washington, Attorney for the Plaintiff.
Edward J. Cannon, #120 Wall Street, Spokane, Washington, Attorney for the defendant.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Transcript of the Record.

Be it remembered: That on the 27th day of June, 1908, there was duly filed in the above-entitled court and action a Complaint in the words and figures following, to wit:

2 In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Complaint.

The plaintiff complaining of the defendant alleges:

I.

That on the 24th day of June, 1907, letters of administration upon the estate of Albert E. Phipps, intestate, were issued by the Superior Court of Spokane County, State of Washington, to the plaintiff, who qualified as, and is now, such administrator.

II.

That the plaintiff brings this suit for the benefit of Albert W. Phipps and Martha Phipps, his wife, parents of said Albert E. Phipps, who is dead, without issue, and unmarried.

III.

That the aforesaid parents are now and at all times hereinafter mentioned were citizens of the town of Evanston, County of Uinta, State of Wyoming; that the plaintiff is a citizen of the State of Washington, residing in the City of Spokane, Wash.; that the de-
3 fendant was at the said times and still is a corporation created and existing under the laws of the State of Wisconsin, and that the amount in dispute in the above-entitled cause exceeds $2,000, exclusive of interest and costs.

IV.

That the defendant has been for many years last past, and still is, a common carrier engaged in interstate commerce as the operator of a steam railway from St. Paul, Minnesota, to points on Puget Sound, Washington.

V.

That on or about the 15th day of March, 1906, in the city of Spokane, Washington, the defendant company wrongfully, and against its own rules employed for hire the said Albert E. Phipps as a fireman upon its freight locomotives; that conformably to said employment he entered the defendant's service; and that at the said date he was of the age of eighteen years and about five months only.

VI.

That the deceased was not emancipated; that what he earned belonged to his father; and that out of his wages he had upon divers occasions turned over to one or both of his parents considerable sums of money.

VII.

That during all of the times herein mentioned the defendant company was using in the operation of its road, the "Block System"; and, that under that system, the deceased was required to stand on the steps of his locomotive and to swing himself out from
4 the handhold by one hand, while the locomotive was running at high speed, and to catch from defendant's station agents hoops containing orders for the engineer.

VIII.

That the town of Eltopia is in the county of Franklin, in the State of Washington, on the line of the railway aforesaid, and that the defendant there had a station agent.

IX.

That on the 3d day of July, 1906, the said Albert E. Phipps, while occupied and acting under the wrongful control and direction of the said defendant as a locomotive fireman upon one of defendant's freight trains, running at the rate of about twenty-five miles an hour, attempted with due care and caution to catch orders in the manner above described from the said station agent, who was standing on defendant's platform at Eltopia; that through such attempt the said Phipps was without fault on his part thrown from the handhold and steps of his locomotive, fell down upon the platform, thence between the platform and the railroad track, and thereafter under the wheels of the cars following; that thereby his leg was cut off, his head was crushed, he was otherwise mutilated and mangled, and was killed.

X.

That the deceased had no previous experience as such fireman, and that by reason of his youth and inexperience he did not appreciate, and hence did not assume the risks, hazards, and perils of the
5 work assigned to him as an employee of the said corporation.

XI.

That the station platform at Eltopia had by defendant been negligently placed about two feet higher than the railway track, so that a person falling from or hurled from a fast moving engine and cast between the platform and the track would almost unavoidably be drawn under and caught by the wheels of attached cars following.

XII.

That inasmuch as the said platform was not level with the track,

it was not carefully constructed so as to guard against such accidents.

XIII.

That the steps of the said locomotive were exceedingly narrow, and that in connection with them and the handhold, the defendant had neglected to provide, as was its duty, any chain, strap, rod, or other appliance whatsoever as a safeguard for fireman catching orders.

XIV.

That the said station agent when first employed at Eltopia by defendant as a fellow-servant of the deceased was an intemperate and reckless person.

XV.

That the said station agent who held the order hoop was on this occasion, and was habitually drunk; that although he had no orders for the engineer, he nevertheless indicated to the deceased that he had such orders; and that while the deceased was stretching
6 out to catch the hoop, the said agent wantonly and wrongfully wheeled around, thus causing the deceased to overreach, without fault on his part, to lose his balance, and be thrown from the locomotive to his death.

XVI.

That the habitual drunkenness of the said agent was, or should have been, known to the defendant company; and the plaintiff, upon information and belief, alleges that such habitual drunkenness was not, nor would have been readily known to the deceased.

XVII.

That the father and mother of the deceased had no knowledge whatever that the deceased was engaged in such perilous occupation; that they never agreed nor consented that the deceased should be so engaged; and that the said engagement was against their will.

XVIII.

That the deceased at the time of his death was a healthy, strong and industrious boy; and that he was then earning about $1,000 a year, and that the following year thenceforth he would have been able to earn about $1,500 a year.

XIX.

Further, the plaintiff alleges that the said Albert W. Phipps, on account of the said death of his son, made a long journey by railroad, namely, from his home in the town of Evanston, in the State of Wyoming, into the State of Washington, and returned, at an
7 approximate cost of $100 in money spent and time lost, so that he might better examine and settle up the affairs of the deceased; and that the charges for transportation of the remains to

his said home, the expenditures incidental thereto, and the funeral expenses were about $150.00.

XX.

That by reason of the aforesaid negligent, wrongful, and unlawful acts of the defendant company resulting in the death of their son, the parents of the deceased have been grievously damaged in the sum of Twenty-Five Thousand Two Hundred and Fifty Dollars.

XXI.

The plaintiff finally alleges that this action is brought under the provisions of that Act of Congress, approved the 22d day of April, 1908, entitled: "An Act relating to the liability of common carriers by railroad to their employees in certain cases."

Wherefore, plaintiff prays judgment in his name but for the benefit of the said Albert W. Phipps and the said Martha Phipps, for the sum of Twenty-five Thousand Two Hundred and Fifty Dollars, and for the costs of this suit.

(Signed) B. C. MOSBY,
Attorney for Plaintiff.

STATE OF WASHINGTON,
County of Spokane, ss:

I, William H. Winfree, first being duly sworn, say: That in my representative capacity, I am the plaintiff in the within entitled action; that I have read the foregoing complaint; and that I believe it to be true.

(Signed) WILLIAM H. WINFREE.

Subscribed and sworn to before me this 26th day of June, 1908.

(Signed) WARREN W. TOLMAN,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, Wash.*

[Endorsements:] Service of papers herein may be made upon B. C. Mosby, Attorney for Plaintiff, 324 Fernwell Block, Spokane, Washington. Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. June 27th, 1908. Frank C. Nash, Clerk.

And afterwards, to wit, on the 10th day of July, 1908, there was duly filed in said court and case Defendant's Demurer to Plaintiff's Complaint, in the words and figures following, to wit:

[Demurrer to Complaint.]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

9 Comes now defendant and demurs to the complaint of plaintiff on the following grounds:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said action was not commenced within the time limited by law.

3. That the Act of Congress approved April 22, 1908, under the provisions of which plaintiff's action is brought and upon which he expressly relies to maintain said action, was passed and approved and became law after plaintiff's alleged cause of action accrued, and said Act of Congress does not impose any duty or create any liability on the part of defendant as to plaintiff's alleged cause of action, and said Act of Congress is without force or effect to create any right in favor of plaintiff or impose any liability on defendant by reason of the facts set forth in the complaint, and which constitutes plaintiff's alleged cause of action.

(Signed) EDWARD J. CANNON,
Attorney for Defendant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law, and that the same is not interposed for delay.

(Signed) EDWARD J. CANNON,
Attorney for Defendant.

[Endorsements:] Due service of within demurrer by receipt of a true copy thereof admitted this 10th day of July, 1908. (Signed) B. C. Mosby, Attorney for Plaintiff. Demurrer to Complaint. Filed in the U. S. Circuit Court for the Eastern District of Wash-
10 ington. July 10th, 1908. Frank C. Nash, Clerk.

And afterwards, to wit, on the 5th day of September, 1908, there was duly filed in said court and case the Opinion of the Court Sustaining Demurrer to Complaint, and Order Sustaining Demurrer to Complaint, in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Opinion.

B. C. Mosby, for Plaintiff.
Edward J. Cannon, for Defendant.

WHITSON, *District Judge:*

It is alleged that the plaintiff's intestate met his death on the 3d day of July, 1906, through the wrongful acts of the defendant while engaged as one of its employees, for which damages are demanded.

Plaintiff relies upon the Act of Congress approved April 22d, 1908, entitled: "An Act relating to the liability of common
11 carriers by railroad to their employees in certain cases." (Statute, 1908, Part I, p. 65.)

The point raised by defendant on demurrer to the complaint is, that the grievance complained of antedates the passage of the statute. Passing over the familiar doctrine that it must clearly appear that it was intended that a statute should have retroactice effect before it will be so construed, we are confronted with the more serious question of statutory construction, namely, whether substantial rights which the defendant enjoyed at the time of the accident would be taken away by applying the statute subsequently passed to the occurrence set out in the complaint.

Plaintiff has cited Plummer vs. Northern Pacific Railway Company, 152 Fed. 206, as sustaining the contention that the statute is retroactive, but it was held in that case that the Employer's Liability Act of June 11th, 1906, created a new right and a new obligation, and that, therefore, it should not be construed to operate retroactively. In this view I fully concur. Certainly it must be so under the more sweeping provisions of the later act. Under the law as it existed at the time of the accident, if the proximate cause of the injury was the fault of the one injured he was without remedy. Under section 3 of the Act of Congress contributory negligence does not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. In other words, under its provisions, if applicable, the plaintiff might recover, and he here confessedly seeks to re-
12 cover, upon a state of facts which would not have entitled him to a judgment at the time the right accrued. This would

deprive the defendant of something substantial and confer upon the plaintiff a benefit which was not existent and which was not in contemplation of the parties when the relation of employer and employee was entered into.

Whatever be the proper construction of section 4 of the Act, it is to be observed that it is at least a modification of the rule relating to assumption of risk which existed prior to its adoption. Since it cannot be supposed that Congress intended to disturb existing rights, it must be held that the statute was intended to be prospective in its operation.

Accordingly the demurrer will be sustained.

[Endorsements:] Opinion Sustaining Demurrer to Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington, September 5th, 1908. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

13 *Order [Sustaining Demurrer to Complaint].*

The demurrer of defendant to plaintiff's complaint came on regularly and duly to be heard on August 31, 1908, and after hearing argument of counsel, the Court took same under advisement, and now, the Court being fully advised in the premises, it is hereby

Ordered, that the demurrer of defendant to the complaint be, and the same is, hereby sustained. Exception allowed plaintiff.

Done at Chambers, this 5th day of September, 1908.

(Signed) EDWARD WHITSON, *Judge.*

[Endorsements:] Order Sustaining Demurrer to Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. September 5th, 1908. Frank C. Nash, Clerk.

14 And afterwards, to wit, on the 29th day of September, 1908, there was duly filed in said court and cause a stipulation refusing to plead further and Judgment, in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Stipulation [Reciting that Plaintiff Refuses to Plead Further, etc.].

It is hereby stipulated by the undersigned attorneys of record for the respective parties to the above-entitled action that the defendant's demurrer to the complaint herein having been duly sustained by the Court, the plaintiff refuses to plead further and stands upon his complaint.

Dated at Spokane, Washington, this 29th day of September, 1908.

(Signed) B. C. MOSBY,
Attorney for Plaintiff.

(Signed) EDWARD J. CANNON,
Attorney for Defendant.

15 [Endorsements:] Stipulation. Filed in the U. S. Circuit Court for the Eastern District of Washington, September 29th, 1908. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Judgment.

Order having been duly entered in the above-entitled action on the 5th day of September, 1908, sustaining demurrer of defendant to the complaint, and plaintiff having refused to further plead,

Now, therefore, by virtue of the law and the premises, it is hereby

Ordered, that the above-entitled action be, and the same is, hereby dismissed.

It is further ordered that defendant have and recover of and from the plaintiff its costs and disbursements herein, taxed at the sum of $16.90.

Done in open court this 29th day of September, 1908.

(Signed) EDWARD WHITSON, *Judge.*

16 [Endorsements:] Judgment. Filed in the U. S. Circuit Court for the Eastern District of Washington, September 29th, 1908. Frank C. Nash, Clerk.

And afterwards, to wit, on the 3d day of October, 1908, there was duly filed in said court and case Plaintiff's Assignment of Errors; Petition for Writ of Error and Order Allowing Same; Bond on Writ of Error; Bill of Exceptions; Writ of Error; Citation and Præcipe for a Transcript of the Record, in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Bill of Exceptions.

Be it known that on the 31st day of August, 1908, before the Hon. Edward Whitson, presiding Judge, the above-entitled cause came on for hearing upon the defendant's demurrer to the complaint, the plaintiff appearing by his attorney, B. C. Mosby, and the defendant, by its attorney, Edward J. Cannon.

17 The demurrer was argued and submitted to the Court. Thereafter, to wit, on the 5th day of September, 1908, the Court sustained the demurrer and executed an order to that effect. To the order the plaintiff excepted, and his exception was allowed. The plaintiff now presents this, his bill of exceptions herein, and prays that the same may be duly settled.

(Signed) B. C. MOSBY,
Attorney for Plaintiff.

Certificate [to Bill of Exceptions].

I, Edward Whitson, United States District Judge for the Eastern District of Washington, who heard and determined the demurrer aforesaid, do certify that the foregoing bill of exceptions is correct, and that it is hereby made a part of the record in this cause.

Dated at Spokane, Washington, this 3d day of October, 1908.

(Signed) EDWARD WHITSON, *Judge.*

O. K.
E. J. C.

[Endorsements:] Bill of Exceptions. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 3d, 1908. Frank C. Nash, Clerk.

18 In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors, upon which he will rely in the prosecution of his writ of error in the above-entitled cause:

1st Error. The Court erred in sustaining the demurrer interposed by the defendant to the Complaint;

2nd Error. The Court erred in rendering judgment against the plaintiff.

Wherefore, the plaintiff prays that the judgment of the said Court be reversed.

(Signed) B. C. MOSBY,
Attorney for Plaintiff.

[Endorsements:] Assignment of Errors. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 3d, 1908. Frank C. Nash, Clerk.

19 In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Petition for Writ of Error.

To the Hon. Edward Whitson, Judge of the District Court of the United States for the Eastern District of Washington:

The plaintiff in the above-entitled cause, William H. Winfree, as administrator of the Estate of Albert E. Phipps, deceased, feeling himself aggrieved by reason of manifest error in the Court's order in the said cause as well as in the Court's judgment thereupon rendered at the September term on the 29th day of September, A. D.

1908, now comes and prays for the allowance of a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, to secure a vacation of said order and judgment.

20 The plaintiff further prays that an order be made fixing the amount of bond to be furnished upon the said writ of error.

Dated this 3d day of October, 1908.

(Signed) B. C. MOSBY,
Attorney for Plaintiff.

[Endorsed:] Petition for Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 3d, 1908. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Order Allowing Writ of Error.

On this 3d day of October, 1908, a petition for a writ of error and an assignment of errors having been filed by the plaintiff, it is ordered that such writ be, and it is hereby, allowed and the amount of the bond thereupon is fixed at Two Hundred Dollars.

(Signed) EDWARD WHITSON, *Judge.*

[Endorsements:] Order Allowing Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington.

21 October 3d, 1908. Frank C. Nash, Clerk.

Writ of Error [Original].

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, Greeting:

Because in the record and proceedings, and also in the rendition of judgment in a certain cause in the said Circuit Court, wherein William H. Winfree, as administrator of the estate of Albert E. Phipps, deceased, was plaintiff and Northern Pacific Railway Company, was defendant, a manifest error hath happened, to the great

damage of the said William H. Winfree, administrator, as by his petition appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded to send under your seal, distinctly and openly, the record, proceedings, and judgment aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California on the first Monday of November next, in the said Circuit Court of Appeals, to be there and then held, that the record, proceedings, and judgment aforesaid may be inspected, and the said Circuit Court of Appeals may
22 cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this third day of October, in the year of our Lord one thousand, nine hundred and eight, and of the Independence of the United States, the one hundred and thirty-third.

[SEAL.] FRANK C. NASH,
Clerk of the United States Circuit Court for the Eastern District of Washington.

Acceptance of Service.

Service of the within writ of error and receipt of a copy thereof, is hereby admitted this third day of October, 1908.

EDWARD J. CANNON,
Attorney for Northern Pacific Railway Company, Defendant and Defendant in Error.

The within writ of error is hereby allowed by

EDWARD WHITSON,
District Judge.

[Endorsed:] No. 1344. In the United States Circuit Court of Appeals for the Ninth Circuit. William H. Winfree, Administrator, Plaintiff in Error, vs. Northern Pacific Railway Company, Defendant in Error. Writ of Error. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 3, 1908. Frank C. Nash, Clerk. ——— ———, Dep.

23 *Citation [Original].*

UNITED STATES OF AMERICA, ss:

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within

thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein William H. Winfree, as administrator of the estate of Albert E. Phipps, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this third day of October, A. D. 1908, and of the Independence of the United States the one hundred and thirty-third.

EDWARD WHITSON,
United States District Judge,
Presiding in the Circuit Court.

Attest:
[SEAL.]

F. C. NASH, *Clerk,*
By W. H. HARE, *Dep.*

24 *Acceptance of Service.*

Service of the within citation and receipt of a copy thereof is admitted this third day of October, 1908.

EDWARD J. CANNON,
Attorney for Northern Pacific Railway Company, Defendant and Defendant in Error.

[Endorsed:] No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. William H. Winfree, Administrator, Plaintiff in Error, vs. Northern Pacific Railway Company, Defendant in Error. Citation. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 3, 1908. Frank C. Nash, Clerk —— ——, Dep.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Bond on Writ of Error.

Know all men by these presents, that I, John H. Roche, am held and firmly bound unto Northern Pacific Railway Company, a cor-

poration, defendant above named, in the sum of Two Hundred Dollars, to be paid to the said corporation or its assigns, to which payment well and truly to be made, I bind myself, my heirs, my representatives and my assigns firmly by these presents.

Signed, sealed and dated the third day of October, 1908.

Whereas the above-named plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause renderd by the Circuit Court of the United States for the Eastern District of Washington, Eastern Division:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff, William H. Winfree, as administrator of the estate of Albert E. Phipps, deceased, shall prosecute the said writ to effect and shall answer all costs and damages, if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) JOHN H. ROCHE.

STATE OF WASHINGTON,
County of Spokane, ss:

On this third day of October, 1908, before me, F. W. Girand, a Notary Public, personally appeared John H. Roche to me known to be the person described as the obligor in the foregoing bond; and he acknowledged to me that he freely executed the said instrument for the uses and purposes therein mentioned.

[NOTARIAL SEAL.] (Signed) F. W. GIRAND,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

The foregoing bond is hereby approved by

(Signed) EDWARD WHITSON,
District Judge.

O. K.
(Sgd.) E. J. C.

[Endorsements:] Bond on Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 3d, 1908. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Præcipe [for Certified Transcript of Record].

To the clerk of the above-entitled court:

You will please prepare a certified transcript of the record
27 in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal to the said Court heretofore perfected, and include therein the following: Writ of Error, Bond, Assignment of Errors, Citation, Complaint, Demurrer, Opinion of Judge, Order Sustaining Demurrer, Stipulation, Judgment, Bill of Exceptions, and Order Allowing Writ of Error.

The said transcript is required to be on file in the office of the Clerk of the said Circuit Court of Appeals at the City of San Francisco on or before the 2d day of November, 1908.

(Signed) B. C. MOSBY,
Attorney for Plaintiff in Error.

[Endorsed:] Præcipe. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 3d, 1908. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1344.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

28 *Clerk's Certificate to Transcript of Record.*

UNITED STATES OF AMERICA,
Eastern District of Washington,
State of Washington, ss:

I, Frank C. Nash, Clerk of the Circuit Court of the United States for the Eastern District of Washington, do hereby certify that the

foregoing typewritten pages, numbered from one (1) to thirty (30), inclusive, constitute and are a complete, true and correct copy of the record, papers and all proceedings had in said action, as the same remain on file and of record in my office in said Circuit Court, and that the same, which I transmit, constitute my return to the annexed Writ of Error, lodged and filed in my office on the 3d day of October, A. D. 1908.

I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying said record amounts to the sum of Sixteen and 30/100 ($16.30) Dollars, and that the same has been paid in full by B. C. Mosby, attorney for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at the City of Spokane, in said Eastern District of Washington, in the Ninth Judicial Circuit, the 13th day of October, A. D. 1908, and the Independence of the United
29 States of America the One Hundred and Thirty-third.

[SEAL.] FRANK C. NASH,
Clerk U. S. Circuit Court for the Eastern District of Washington.

[Endorsed:] No. 1663. United States Circuit Court of Appeals for the Ninth Circuit. William H. Winfree, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error, vs. The Northern Pacific Railway Company (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division. Filed November 2, 1908. F. D. Monckton, Clerk.

---

30 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-nine (29) pages, numbered from and including one (1) to and including twenty-nine (29), to be a true copy of the printed Transcript of Record upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division, in the above-entitled cause, as the original and copies of the said Printed Transcript of Record were printed under my supervision

pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this thirteenth day of September, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

31 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

Names and Addresses of Attorneys of Record:

For the Plaintiff in Error: B. C. Mosby, The Rookery, Spokane, Washington.

For the Defendant in Error: E. J. Cannon, Spokane, Washington; Charles W. Bunn, Spokane, Washington.

32 At a stated term, to wit: the October term, A. D. 1909, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City of and County of San Francisco, on Monday, the tenth day of May, in the year of our Lord one thousand, nine hundred and nine.

Present:

Honorable William B. Gilbert, Circuit Judge,
Honorable Erskine M. Ross, Circuit Judge,
Honorable William H. Hunt, District Judge.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Order of Submission.

Pursuant to the stipulation of the counsel for the respective parties, filed therefor, ordered, above-entitled cause submitted to the Court for consideration and decision on briefs.

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

B. C. Mosby for the Plaintiff in Error.
Edward J. Cannon for the Defendant in Error.

Before Gilbert and Ross, Circuit Judges, and Hunt, District Judge.

GILBERT, *Circuit Judge*, delivered the opinion of the Court.

The plaintiff in error, as administrator of the estate of Albert E. Phipps, deceased, brought an action to recover damages from defendant in error, and in his complaint alleged that the said Albert E. Phipps, a minor of the age of 18 years and 5 months, while acting as a fireman upon a freight locomotive of the defendant in error in the State of Washington, met his death through the negligence of his employer; that the defendant in error was engaged in interstate commerce; that the decedent had not been emancipated, nor had his parents any knowledge of his employment; that they
84 lived in the State of Wyoming, and that the action was brought for their benefit under the provisions of the Act of Congress approved April 22, 1908, an Act relating to the liability of common carriers by railroad to their employés in certain cases. The complaint set forth the particulars in which it was alleged that the defendant in error was negligent, and alleged that the decedent had no previous experience as fireman, and by reason of his youth and inexperience, did not appreciate, and hence did not assume the risks, hazards and perils of the work assigned to him, and that the accident occurred without fault on his part. The defendant in error demurred to the complaint, and the demurrer was sustained on the ground that the Act of Congress so referred to, has no retroactive application. The plaintiff in error pleading no further, judgment was entered against him.

The sufficiency of the complaint is the sole question which is presented for our determination. The plaintiff in error contends that the Act of 1908 being a remedial measure, should be construed as retroactive unless such a construction is precluded by its terms. It is not necessary to cite authorities to the well settled rule that a statute will not be given a retroactive effect by construction unless the legislature has so explicitly expressed its intention to make it retroactive, as to leave no reasonable doubt thereof. In the act in

question, Stats. of 1908, 65, it is provided that every common carrier engaged in interstate commerce shall be liable in damages for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of the carrier. There
35 is nothing in the terms of the Act to show that it was the intention of Congress to affect rights of parties as to any injury or death that had occurred before it went into effect. It is not to be presumed that Congress intended to impose civil liability upon carriers founded upon transactions which, at the time of their occurrence, gave no rise to a legal demand against them. In Twenty Per Cent Cases, 20 Wall. 179, 187, the court said: "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule, courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive action." The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the courts, such as statutes intended to remedy a mischief to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof. It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred. In The
36 Society, etc., v. Wheeler et al., 2 Gall. 104-139. Judge Story said: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities." Tested by these principles it seems clear that the Act of 1908 is in none of its features retroactive.

But the plaintiff in error contends that irrespective of the statute, the complaint states a common law cause of action against the defendant in error upon the distinct charges of negligence which are therein set forth. In answer to this it is sufficient to point to the fact that the complaint in this case is brought to recover the damages that resulted to the parents of the decedent from the loss of his earnings during his minority, and that the statute of Washington, Sec. 4829 Ball. Code gives the right of action in such a case to the father, or, in the case of his death or his desertion of his family, to the mother, and for injury or death of a ward, to his guardian, and that by the laws of that state, no such right of action accrues to a personal representative. Atrops v. Costello, 8 Wash. 149; Noble v. Seattle, 19 Wash. 133; Mannug v. Tacoma R. & P. Co. 34 Wash.

406. It is true that by the Act of Congress of June 11, 1906, a right of action was given to the personal representative in a case of this nature, and what law was in force at the time of the death of the decedent here it cannot be said that this action is brought under its sanction, because all actions thereunder were required to be
37 brought within one year from the date of the injury complained of.

The judgment is affirmed.

(Endorsed:) Opinion. Filed October 4, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

38 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs in favor of the defendant in error; and that the defendant in error The Northern Pacific Railway Company, A Corporation, recover against the plaintiff in error William H. Winfree, as Administrator of the Estate of Albert E. Phipps, Deceased, for its costs herein expended, and have execution therefor.

(Endorsed:) Judgment. Filed and entered October 4, 1909. F. D. Monckton, Clerk.

39 At a Stated Term, to wit: The October Term, A. D. 1909, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court Room, in the City and County of San Francisco, on Friday, the Twelfth Day of November, in the Year of Our Lord One Thousand, Nine Hundred and Nine.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.
Honorable William H. Hunt, District Judge.

No. 1663.

WILLIAM H. WINFREE, as Administrator, etc., Plaintiff in Error,
vs.
THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Order Staying Issuance of a Mandate Under Rule 32.

Upon consideration of the motion and affidavit of Mr. B. C. Mosby, counsel for the plaintiff in error, and on proof of due service thereof upon Mr. Edward J. Cannon, counsel for the defendant in error, it is ordered that the issuance of a Mandate of this Court under rule 32 in the above-entitled cause be, and hereby is stayed until the further order of this Court.

40 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Eror (to the Supreme Court U. S.).

To the Hon. William B. Gilbert, U. S. Circuit Judge for the Ninth Circuit:

The plaintiff in error in the above entitled cause, William H. Winfree as Administrator of the Estate of Albert E. Phipps, deceased, feeling himself aggrieved by reason of manifest error in the Court's judgment therein rendered at the October term on the 4th day of October, A. D. 1909, now comes and prays for the allowance of a writ of error to the Honorable Supreme Court of the United States, to secure a vacation of the said judgment.

The plaintiff in error further prays that an order be made fixing

the amount of bond to be furnished upon the said writ of error.

41 Dated this 29th day of June, 1910.

B. C. MOSBY,
Attorney for Plaintiff in Error.

(Endorsed:) Petition for Writ of Error to Supreme Court U. S. Filed Aug. 15, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

42 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Order Allowing Writ of Error (to Supreme Court U. S.) and Fixing Amount of Bond.

On this 8th day of August, 1910, an assignment of error and a petition for a writ of error having been presented by the plaintiff in error, it is hereby ordered that the said petition be granted. The amount of the bond, upon issuance of the said writ, is fixed at Two hundred dollars.

WM. B. GILBERT,
U. S. Circuit Judge.

(Endorsed:) Order Allowing Writ of Error to Supreme Court U. S. and Fixing Amount of Bond. Filed Aug. 15, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

43 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Assignment of Error.

The plaintiff in error files the following assignment of error, upon which he will rely in the prosecution of his writ of error in the above-entitled cause:

I.

The appellate court erred in its affirmance of the judgment of the U. S. Circuit Court for the Eastern District of Washington, Eastern Division.

Wherefore the plaintiff in error prays that the judgment of the said appellate court be reversed.

B. C. MOSBY,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of Error. Filed Aug. 15, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

44 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phippe, Deceased, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Bond on Writ of Error (to Supreme Court U. S.).

Know all men by these presents, that I John H. Roche am held and firmly bound unto Northern Pacific Railway Company, a Corporation, defendant in error, above named in the sum of Two Hundred Dollars to be paid to the said corporation or its assigns, to which payment well and truly to be made, I bind myself, my heirs, my representatives and my assigns firmly by these presents.

Signed, sealed and dated the 18th day of August, 1910.

Whereas the above named plaintiff in error has sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above-entitled cause rendered by the United States Circuit Court of Appeals for the Ninth Circuit:—

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, William H. Winfree as
45 administrator of the estate of Albert E. Phippe, deceased, shall prosecute the said writ to effect and shall answer all costs and damages, if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

JOHN H. ROCHE.

STATE OF WASHINGTON,
County of Spokane, ss:

On this 18th day of August, 1910, before me, Frank W. Girand, a Notary Public, personally appeared John H. Roche, to me known to be the person described as the obligor in the foregoing bond; and

he acknowledged to me that he freely executed the said instrument for the uses and purposes therein mentioned.

[NOTARIAL SEAL.] FRANK W. GIRAND,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

The foregoing bond is hereby approved by

WM. B. GILBERT,
U. S. Circuit Judge.

O. K.
E. J. CANNON,
Att'y for Def't.

46 (Endorsed:) Bond on Writ of Error to Supreme Court U. S. Filed Aug. 29, 1910, F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

47 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Præcipe for Certified Transcript of Record (on Writ of Error to Supreme Court U. S.)

To the Clerk of the above-entitled Court:—

You will, please, prepare a certified transcript of the record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal to the said Court heretofore perfected; and embody therein copies of the following: Assignment of Error, Petition for Writ of Error, Order Allowing Writ of Error and Fixing Bond, and Bond on Writ of Error, together with a copy of the previous record of the said cause as such record appears in your office, including the appellate court's Opinion and the Judgment you have entered.

The transcript is required to be on file in the office of the Clerk of the Supreme Court of the United States at the City of Washington D. C., on or before the 19th day of September, 1910.

48 B. C. MOSBY,
Attorney for Plaintiff in Error.

(Endorsed:) Præcipe for Certified Transcript of Record on Writ of Error to Supreme Court U. S. Filed September 12, 1910. F. D. Monckton, Clerk.

49 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1663.

WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Transcript of Record upon Return to Writ of Error.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing nineteen (19) pages, numbered from and including one (1), to and including nineteen (19), to be a true copy of the Assignment of Error and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the Opinion filed therein, as the same remain on file and of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record constitute a true copy of the complete record in the above entitled case and the Transcript of Record upon return to the annexed writ of error therein from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this thirteenth day of September, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

50 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of The United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:—

Because in the rendition of judgment in a certain cause in the said Circuit Court of Appeals, wherein William H. Winfree as administrator of the estate of Albert E. Phipps, deceased, was plaintiff in error and Northern Pacific Railway Company was defendant in error, a manifest error hath happened, to the great damage of the said William H. Winfree, administrator, as by his petition appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded to send under your seal, distinctly and openly, the record, proceedings, and judgment aforesaid, with all things concerning the same, to the Supreme Court of

the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia on the third Monday in September next in the said Supreme Court, to be there and then held, that the record, proceedings and judgment aforesaid may be inspected, and the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this 15th day of August in the year of our Lord one thousand nine hundred and ten,
51 and of the Independence of the United States, the one hundred and thirty-fifth.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

The within writ of error is hereby allowed by

WM. B. GILBERT,
U. S. Circuit Judge.

Acceptance of Service.

Service of the within writ of error and receipt of a copy thereof, is hereby admitted this 25th day of August, 1910.

EDWARD J. CANNON,
Attorney for Northern Pacific Railway Company, Defendant in Error.

52 *Return to Writ of Error.*

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We certify that a copy of this writ was on the 13th day of September, A. D. 1910 duly lodged in the cause in this Court for the within named defendant in error.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Endorsed: No. 1663. In the U. S. Circuit Court of Appeals for the Ninth Circuit. William H. Winfree, as Administrator of the Estate of Albert E. Phipps, Deceased, Plaintiff in Error, vs. Northern

Pacific Railway Company, a Corporation, Defendant in Error. Writ of Error. Filed August 29, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

53 *Citation.*

UNITED STATES OF AMERICA, ss:

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington in the District of Columbia, within sixty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein William H. Winfree as administrator of the estate of Albert E. Phipps, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States of America, this 2nd day of September, A. D. 1910, and of the Independence of the United States, the one hundred and thirty-fifth.

WM. B. GILBERT,
United States Circuit Court Judge, Presiding in the U. S. Circuit Court of Appeals for the Ninth Circuit.

Attest:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

54 *Acceptance of Service.*

Service of the within citation and receipt of a copy thereof is admitted this 9th day of September, 1910.

EDWARD J. CANNON &
CHARLES W. BUNN,
Attorneys for Northern Pacific Railway Company, Defendant in Error.

Endorsed: No. —. In the Supreme Court of the United States. William H. Winfree, Administrator, Plaintiff in Error, vs. Northern Pacific Railway Company, Defendant in Error. Citation. No. 1663. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 22,325. U. S. Circuit Court Appeals, 9th Circuit. Term No. 139. William H. Winfree, as administrator of the estate of Albert E. Phipps, deceased, plaintiff in error, vs. Northern Pacific Railway Company. Filed September 29th, 1910. File No. 22,325.

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM 1912.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM H. WINFREE, AS ADMINISTRATOR OF THE ESTATE OF ALBERT E. PHIPPS, DECEASED,
Plaintiff in Error,

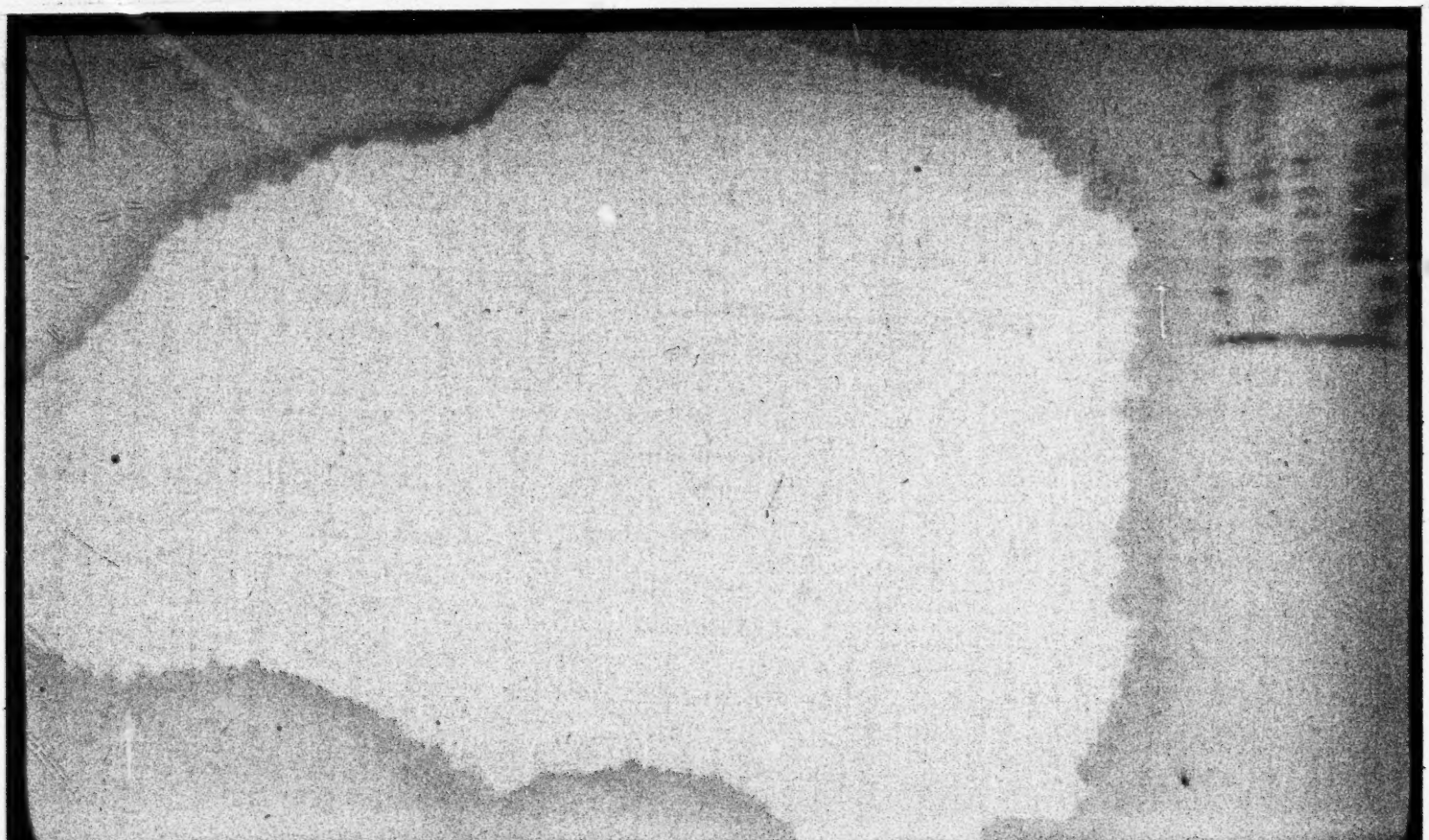
vs.

NORTHERN PACIFIC RAILWAY COMPANY, *A Corporation,*
Defendant in Error.

No. 139.

Brief for Plaintiff in Error.

B. C. MOSBY,
Attorney for Plaintiff in Error,
Spokane,
Washington.



INDEX.

	Page.
Argument	3-22
Specification of Errors	2-3
Statement of the Case	1-2

CASES CITED.

Barbour vs. Horn, 48 Ala. 659	7
Beach vs. Bay State Co., 27 Barb. N. Y. 248	5
Bevier vs. Dillingham, 18 Wis. 556	7
Bolinger vs. St. Paul etc. R. R. Co., 36 Minn. 418	5
Bowers vs. Bowers, 1 Abb. Dec. 214	7
Cannon vs. Rowland, 34 Ga. 422	7
Campbell vs. Holt, 115 U. S. 620-634	17
Chapman vs. State, 104 Calif. 690	7
Commissioners of Sedgwick County vs. Bunker, 16 Kan. 498	7
Gage vs. Gage, 66 N. H. 294	9
Gibbons vs. Ogden, 9 Wheat. 1,196	10
Haggerty vs. Central R. R. Co., 31 N. J. L. 349	5
Hayes vs. Williams, 17 Colo. 467-468	4
Jefferson City Gas Light Co. vs. Clark, 95 U. S. 644	7
Kleps vs. Bristol Manufacturing Co., 81 N. E. Rep. 765	20
Kuehn vs. Paroni, 20 Nev. 203	7
Lamphear vs. Buckingham, 33 Conn. 237	5
Larkins vs. Saffarans, 15 Fed. Rep. 147	5
Louisville & Nashville Railroad Co. vs. Mottley, 219 U. S. 467	13, 14
Lycoming vs. Union County, 15 Penn. St. 166	7
Merkle vs. Bennington Tp., 58 Mich. 156	5
Milne vs. Huber, 3 McLean 217, F. C. 9, 617	9
Noble vs. City of Seattle, 19 Wash. 133	19
Parnaby vs. Lancaster Canal Co., 11 Ad. & El. 223	21
People vs. Columbia County, 43 N. Y. 132	9

People vs. Essex County, 70 N. Y. 236..... 9
Phil. Balt. & Wash. R. R. Co. vs. Schubert, 224 U. S. 603 12
Plummer vs. Northern Pacific Railway Co., 152 Fed. 206 .....7, 16, 17
Robinson vs. Baltimore & Seattle Mining & Reduction Co., 26 Wash. 484..... 22
Rouge vs. Rouge, 36 N. Y. Supp. 436..... 7
Second Employers' Liability Cases, 223 U. S. 50, 51..10, 11
Sohn vs. Waterson, 17 Wall. 599..... 8
Soule vs. New York etc. R. R. Co., 24 Conn. 575..... 5
Spain vs. St. Louis & S. F. R. Co., 151 Fed. 529..... 4
Stewart vs. Balt. & Ohio R. R. Co., 168 U. S. 448..4, 5, 20
The Employers' Liability Cases, 207 U. S. 447, 463, 493, 537.....4, 8, 11, 11
United States vs. Bowen, 100 U. S. 508..... 8
Vance vs. Southern R. R. Co., 138 N. C. 839..... 5
Viterbo vs. Friedlander, 120 U. S. 707..... .. 8
Wabash etc. R. R. Co. vs. Shacklett, 10 Ill. App. 404.. 5
Walker vs. Ware, Hadham etc. Rail Co., 12 Jur. (N. S.) 18 10

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM 1912.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM H. WINFREE, AS ADMINISTRATOR OF THE ESTATE OF ALBERT E. PHIPPS, DECEASED,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, *A Corporation,*
Defendant in Error.

No. 139.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

On the 3rd day of July, 1906, Albert E. Phipps, a minor, while acting as a fireman upon a fast freight locomotive of the Northern Pacific Railway Company in the state of Washington, met his death through the neg-

ligence of his employer. The railway company is a non-resident corporation; and its locomotive was then engaged in interstate commerce.

When killed Phipps was of the age of eighteen years and about five months. He had not been emancipated; nor had his parents knowledge of such employment. They lived in the state of Wyoming. For their benefit, his personal representative brought an action, in the circuit court for the eastern district of the state of Washington, against the railway company; and expressly invoked the provisions of the Act of Congress, approved April 22, 1908, entitled:— "An Act relating to the liability of common carriers by railroad to their employes in certain cases."

The defendant demurred to the complaint, upon three grounds. The demurrer was sustained because, in the court's opinion, the Act had no retroactive application. But the order made was not restricted to that ground. The plaintiff being unable to plead further, judgment was entered against him. That judgment was affirmed by the circuit court of appeals for the ninth circuit. The supreme court is now asked to correct the error in the affirmance.

SPECIFICATION OF ERRORS.

1. The court of appeals erred in affirming the judgment of the circuit court to the effect that the Act of Congress invoked was not retrospective.

2. The court of appeals erred in holding that, apart from the Act in question, the complaint did not state a cause of action under the Washington law.

ARGUMENT.

I.

The sole question for the court's determination is the sufficiency of the complaint. That question was presented by the defendant's demurrer. The theory upon which the demurrer was upheld—that the Act was not retroactive—will be discussed first.

The Act is a remedial measure. It was designed to supply a remedy for wrongs for which the law had offered no adequate redress or, as in the case at bar, no redress whatever. The Act should therefore be construed as applicable to past as well as to future injuries. The one no less than the other are deserving of reparation. To indemnify for former negligence as much as to provide against negligence in the future, was within the power of Congress and was presumably within the purpose of Congress.

If the meaning of the statute were doubtful, judicial construction ought not to lean towards the wrong-doer but should rather give the benefit of the doubt to the victims of the wrong. There is no sound reason to favor the common carrier. On the other hand, there are very cogent reasons to sustain the contention of the administrator on behalf of the intestate's parents.

In Stewart *vs.* Balt. & Ohio R. R. Co., 168 U. S. 448, Mr. Justice Brewer, in rendering the opinion of the court, which was unanimous, observed:—

> "Such statutes [those modeled from Lord Campbell's Act] are not penal but *remedial*, for the benefit of persons injured by the death."

He further declared that the statute there under consideration *"simply takes away a common law obstacle to a recovery for an admitted tort."*

See also:—

> *Spain vs. St. Louis & S. F. R. Co.*, 151 Fed. Rep. 529.

So in a similar case, the supreme court of Colorado said:—

> "The statutory provisions under which this action was brought (Mills, Sec. 1509, 1510) are *remedial*, not penal.
>
> * * * * * * * *
>
> "They are in aid of the common law, not in derogation of it."

Hayes vs. Williams, 17 Colo. 467-468.

Of the first Employers' Liability Act—that of June 11, 1906, Attorney General Bonaparte argued:—

> "It is a remedial statute and should, therefore, be liberally construed so as to accomplish the end in view."

Employers' Liability Cases, 207 U. S. 447.

To correct the imperfections of the former Act, Congress passed the Act of April 22, 1908. The second is, like the first, clearly remedial and, should accordingly receive a catholic construction.

36 *"Cyc."* 1173, 2 *et seq.* and note 55;
Id. 1174, notes 72 and 76;
Id. 1188, subd. 8;
13 *"Cyc."* 312, note 9;
I *Chitty's Blackstone's Commentaries,* (19th London Ed.), side page 88, note 30;
Black's Constitutional Prohibitions, (1st. Ed. 1887), § 134, p. 160;
II *Lewis' Sutherland Statutory Construction,* (2nd Ed. 1904), pp. 643-644, 1291; § 519;
Stewart vs. Balt. & Ohio R. R. Co., 168 U. S. 448;
Soule vs. New York etc. R. R. Co., 24 Conn. 575;
Lamphear vs. Buckingham, 33 Conn. 237;
Wabash etc. R. R. Co. vs. Shacklett, 10 Ill. App. 404;
Merkle vs. Bennington Tp., 58 Mich. 156;
Bolinger vs. St. Paul etc. R. R. Co., 36 Minn. 418;
Vance vs. Southern R. R. Co., 138 N. C. 839;
Haggerty vs.. Central R. R. Co., 31 N. J. L. 349;
Beach vs. Bay State Co., 27 Barb. N. Y. 248.

The Act of 1908, being then of a remedial nature, should be construed as retroactive if such construction is not precluded by its terms. Larkins *vs.* Saffarans, 15 Fed. Rep. 147. Its terms, however, so far from precluding that construction rather force it.

"In accordance with the general rule that remedial statutes should be given a liberal construction, they will be freely construed to have a retrospective operation, whenever such seems to have been the intention of the legislature, unless such a construction would impair the validity of contracts, disturb vested rights, or create new obligations."

36 *"Cyc."* 1209, d.

"The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure."

36 *"Cyc."* 1213, 2, a.

"The courts have with considerable uniformity sustained retrospective laws enacted for the purpose of furnishing remedies for the enforcement of pre-existent moral obligations, which were not legally enforceable," etc.

Wade on Retroactive Laws, (1st Ed.), Sec. 24.

To the same effect is

Myer on Vested Rights, (1st Ed. 1891), § 25, p. 18;
Black on Interpretation of Laws, (1st Ed. 1896), p. 261; and
Black's Constitutional Prohibitions, (1st Ed. 1887), pp. 176, 276, 277.

See also:—

8 "*Cyc.*" 910 (III) and, cases cited in note 68 thereto;
Id. 1021, note 62;
Jefferson City Gas Light Co. vs. Clark, 95 U. S. 644;
Lycoming vs. Union County, 15 Penn. St. 166;
Barbour vs. Horn, 48 Ala. 659;
Commissioners of Sedgwick County vs. Bunker, 16 Kan. 498.

For an injury received in March, 1906, a judgment was rendered in an action under the Employers' Liability Act of June, 1906. Plummer *vs.* Northern Pacific Railway Co., 152 Fed. 206. The judgment was vacated merely because the court had given erroneous instructions.

Remedial statutes were retroactively applied in actions for injuries in:—

Chapman vs. State, 104 Calif. 690;
Cannon vs. Rowland, 34 Ga. 422;
Bevier vs. Dillingham, 18 Wis. 556;
Rouge vs. Rouge, 36 N. Y. Supp. 436;
Brower vs. Bowers, 1 Abb. Dec. 214;
Kuehn vs. Paroni, 20 Nev. 203.

The Act of 1908 is shown, by its entire phraseology, to relate to past as well as to future occurrences.

First, section 3 refers to "all actions hereafter brought." Such "actions" are not confined to *causes* of action arising subsequently.

Second, section 3 deals with injuries not merely that "result" or that "shall have resulted" but that "have resulted" already in the employe's death.

Third, section 6 requires the action to be "commenced within two years from the day the cause of action *accrued.*" If Congress had intended to restrict to the future the application of the Act, then the word would have been "*accrues.*" But even that change—or a greater—would not effect such a restriction.

Sohn vs. Waterson, 17 Wall. 599.

Furthermore, it is significant that this limitation of two years is an extension of the one year period provided by the Act of 1906. Thus an evident purpose of Congress in its later legislation was to save the rights of those persons whose suits had abated in consequence of the decision in the first Employers' Liability Cases, 207 U. S. 463.

> "Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof."
>
> *United States vs. Bowen,* 100 U. S. 508;
> *Viterbo vs. Friedlander,* 120 U. S. 707.

> "The occasion of the enactment of a law may be looked into in determining its character as retrospective or prospective."

People vs. Essex County, 70 N. Y. 236;
People vs. Columbia County, 43 N. Y. 132.

In Gage *vs.* Gage, 66 N. H. 294, the supreme court of New Hampshire stated:—

> "The rule against retrospective operation of law allows the introduction of remedies where none existed before, *and their equitable application to existing causes of action.* Cooley, Const. Lim. 347, 436, 442, 454, 477, 478; 1 Hare Const. Law, 421," etc.
>
> * * * * * * * *
>
> "In early * * * times the chief judicial employment of the chancellor must have been in devising new writs, directed to the course of common law, to give remedy in cases where none was before administered. 3 Bl. Comm. 50. *The use of writs invented for such cases was not an infringement of vested rights, but an enforcement of them.*" etc.

Also in Milne *vs.* Huber, 3 McLean 217, F. C. 9, 617, it was held:—

> "The legislature cannot make contracts for individuals, and they cannot impose an obligation which does not equitably arise out of the transaction. But they may give a remedy where there is none, and where in good conscience there should be one. *A remedy being general applies to previous as well as subsequent cases.*"

But counsel for the defendant in error contends that to apply the Act of 1908 in the present instance, would be to destroy vested rights of the railway company, under

the common law. We reply, in the language of Mr. Justice Van Devanter, "a person has no property, no vested interest, in any rule of the common law." Second Employers' Liability Cases, 223 U. S. 50.

Further, counsel's contention is sophistic. For, "there can be no vested right to do wrong"—"no vested wrong." The defendant has "no vested right to kill its employes by negligence." It "can have," as Lord Romilly, M. R., said of the public, "no rights springing from injustice to others." Walker *vs.* Ware, Hadham etc. Rail Co., (1866), 12 Jur. (N. S.) 18.

This doctrine is as old as civilization. Man's responsibility for damages arising from his carelessness was clearly recognized in the earliest of human codes. Reference is made to § 229 of the engraved code of Hammurabbi, king of Babylon, B. C. 2200.

Judge Cooley thus enunciated the true principle:—

> "All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order."
>
> *Constitutional Limitations,* (6th Ed.), p. 438.

So considering this principle in the operation of the interstate commerce power, Mr. Justice White quoted approvingly from Mr. Chief Justice Marshall in Gibbons *vs.* Ogden, 9 Wheat. 1, 196, thus:—

> "'*This power*, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and *acknowledges no limitations other than are prescribed in the Constitution.*'"
> *The Employers' Liability Cases*, 207 U. S. 493.

In this connection we refer again to the opinion of Mr. Justice Van Devanter in Second Employers' Liability Cases, *supra*, pp. 50-51.

The plaintiff, however, insists that the defendant here is threatened with the deprivation of none of its vested rights either in remedies or in property. The pivotal point is not the defendant's deprivation of the one or of the other. The question is:—has not the plaintiff a right to invoke the application of a remedy where before no remedy existed? What public policy demands under these circumstances was determinable and was determined by Congress.

> "Legislators have * * * their own views of justice and public policy, and their views when embodied in a written law must prevail."

—From the dissenting opinion of Mr. Justice Moody in The Employers' Liability Cases, 207 U. S. 537.

But if Congress were not the judge, in its sphere, of the requirements of the common welfare, yet to apply the statute in the case at bar, would no more upset the defendant's vested rights nor impair the obligations of its employment contract with plaintiff's intestate than did the original decisions of common law courts in amending such contracts so as to include the now

familiar implications as to death from wrongful act, assumption of risk, fellow-servant, and contributory negligence.

However, if there be virtue in the rule of *stare decisis*, the recent case of Phil. Balt. & Wash. R. R. Co. *vs.* Schubert, 224 U. S. 603, effectually disposes of the defendant's contention. In principle, our question now is practically the same as that then involved.

The court held there:— that where a brakeman was injured in May 1908 and thereafter voluntarily accepted benefits, which, by the terms of his written contract with the railroad company entered into in 1905, operated as a release and satisfaction of his claim, nevertheless an action for damages was maintainable by him; because, under § 5 of the Act of April 22, 1908, the contract was void.

Accordingly if the defendant carrier there did not possess an indefeasible right in that *express* contract—a contract which antedated the passage of the Act, then *a fortiori* such carriers should have no fixed rights in any mere technical defense founded upon a like *implied* contract.

In the case cited, Mr. Justice Hughes, speaking for the court, said:—

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before

the statute was enacted. But that the provisions of § 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character cannot be doubted."

* * * * * * * *

"Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulations of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. *Prior arrangements were necessarily subject to this paramount authority.*"

* * * * * * * *

"And so, when it decides to protect the safety of employes by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467."

The opinion thereafter indorses these excerpts from pp. 482-486 of the decision cited:—

> "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. *That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.* The framers of the Constitution never intended any such state of things to exist. . . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

In the case at bar, the complaint alleged, *inter alia*, that on the part of the deceased there was no contributory negligence and no assumption of risk. Neither of these allegations was controverted. There was no answer of any kind. Yet the district judge considered that the facts were just the opposite of what was alleged.

At least for the purposes of the demurrer, the complaint should have been taken as true.

The ruling of the district court was based upon matter not simply *dehors* the record but contrary to the record. The opinion states:—

> "Under section 3 of the Act of Congress, contributory negligence does not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. In other words, under its provisions, if applicable, *the plaintiff might recover, and he here confessedly seeks to recover, upon a state of facts which would not have entitled him to a judgment at the time the right accrued.*"
>
> (Trans. p. 7.)

That is erroneous. The plaintiff does not seek to recover "upon a state of facts which would not have entitled him to a judgment at the time the right accrued." Quite the reverse. He alleges that there was no contributory negligence. If so, there could have been recovery under the preexisting law for loss of services. In the concluding paragraph of the opinion it is remarked:—

> "Whatever be the proper construction of section 4 of the Act, it is to be observed that it is at least a modification of the rule relating to assumption of risk which existed prior to its adoption."
>
> (Trans. p. 8.)

All of which is doubtless correct. But it nowhere appears that section 4 has any bearing on the plaintiff's cause of action. The plaintiff does not aver that because the railroad company had violated some statute, the de-

ceased did not assume the risks of the employment. The complaint explicitly sets forth that the reason for such non-assumption was the youthful fireman's inexperience. (Complaint, para. X; Trans. p. 3.)

The district court also remarked that the Employers' Liability Act of June 11, 1906, was held in Plummer *vs.* Northern Pacific Railway Co., 152 Fed. 206, not to operate retroactively, for the reason that by it new rights had been created in regard to contributory negligence. We submit that the court has misconstrued that decision. The injury there antedated the passage of the statute; and it appears that in the petition to set aside the verdict, the defendant urged that the statute was in *no way retroactive.* The petition was not, however, granted upon so wide a ground. It was granted *solely* upon the ground that the court's instructions as to contributory negligence were wrong, and that *the statutory provision in reference to comparative negligence did not apply* to causes of action which had originated prior to the passage of the act.

Indeed, that the trial judge in that action considered the act—except the provision mentioned—applicable to cases of injury occurring before its enactment, is further indicated in the following language used by him:—

> "The phrase 'all actions hereafter brought' is broad enough to include actions for injuries suffered prior to the enactment; but although within the letter of the law, such cases must be deemed to

be not within its purview, if the retroactive effect would defeat the law by making it unconstitutional. *I hold that a retroactive statute enacted by Congress is not unconstitutional, unless its effect would be a deprivation of life, liberty, or property,* contrary to the fifth amendment, and that *the taking away of defenses to civil actions based upon rules of law which are purely arbitrary,* e. g., the statute of limitations, *would not be such a deprivation.* Campbell *vs.* Holt, 115 U. S. 620-634, 6 Sup. Ct. 209, 29 L. Ed. 483."

From the entire decision, but one conclusion is to be drawn. It is that if there had been no error in instructions upon comparative negligence, the petition to set aside the verdict would have been denied. In short, the statute, save in its abrogation of the rule of contributory negligence as to past occurrences, was construed to be retroactively operative. It is to be noted that the circuit court of appeals makes no mention whatever of the *Plummer case,* although both plaintiff and the district court relied upon it.

In the case at bar, the decision of the district court that inasmuch as the application of the statutory provisions considered would impair the "existing rights" of the defendant corporation and that hence all of the other provisions of the Act of 1908 were inapplicable, seems to ignore the violation of the vested right of the corporate servant and his relatives in protection of life. While, under such a narrow construction, the Act's sections as to comparative negligence and assumption of risk might operate only prospectively, yet its other sections—giving the vital part of the remedy—should at any

rate have been held to affect causes of action past as well as future.

> "If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other."
>
> *Cooley's Constitutional Limitations,* (6th Ed.), p. 211.

It may be observed also that, irrespective of the Act of Congress, implied contracts disregarding comparative negligence in cases of homicide should be deemed void as in contravention of public policy; for, public policy ought not to tolerate immunity from damages when possibly the tort-feasor's negligence is gross unto criminality and the victim's contributory negligence is but slight.

26 "*Cyc.*" 1094-1095.

Furthermore, such an implied contract here would be voidable, because made with an infant.

22 "*Cyc.*" 609-610, b.

II.

But apart from the Act of 1908, the complaint presents a case for Federal cognizance. It states a cause of action under the statutes of the state of Washington but, not under the common law. In this regard, the cir-

cuit court of appeals has misunderstood the contention of the plaintiff. (Trans. p. 20.)

Preliminary to *five distinct charges of negligence*, it is alleged in the complaint that:— the plaintiff in error is a citizen of the state of Washington; the parents of the decedent are citizens of the state of Wyoming; the defendant in error is a corporation resident in the state of Wisconsin; and the amount involved in the action exceeds $2,000, exclusive of interest and costs. (Trans. p. 2.)

Under the laws of Washington, when the death of a minor has been caused by wrongful act, the father may compel compensation for the loss of the child's services but he cannot recover a solatium.

Noble vs. City of Seattle, 19 Wash. 133.

The compensation received, however, belongs, under the community system, to the mother as well as to the father.

> "Property, not acquired or owned as prescribed in the next two preceding sections [by gift, bequest, devise or descent], acquired after marriage by either husband or wife, or both, is community property," etc.

II *Rem. & Bal. Code*, § 5917.

To recover the value of such services at least, the plaintiff may therefore maintain this suit for the benefit of the decedent's parents, as the complaint sets forth.

(Trans. para. II, p. 2; para. XXI, p. 5.) For, in the state of Washington "an executor or administrator • • • may sue without joining the person for whose benefit the suit is prosecuted," etc.

I *Rem. & Bal. Code*, § 180.

The Act of Congress provides merely an additional remedy. A recovery thereunder would, of course, include every proper element of damage, that is, not only loss of services—to which the circuit court of appeals would confine the complaint (Trans. p. 20)—but also mental suffering. If then the Federal remedy were inapplicable, nevertheless the parents' right in the state remedy for the lesser injury is unimpaired and enforceable through the plaintiff. For, to use the words of Mr. Justice Brewer:—

> "It is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

Stewart vs. Balt. & Ohio R. R. Co., 168 U. S. 450.

Kleps vs. Bristol Manufacturing Company, 81 N. E. Rep. 765, was an action for personal injury, in which the complaint invoked a state Employers' Liability Act. Recovery was had, however, not under the act but, under the common law.

The defendant there urged on appeal:—

> "The plaintiff having elected to proceed under this particular statute giving new rights and a new specific and exclusive remedy which the common law and its practice denies him, and hence having sought a right and remedy wholly inconsistent with and in derogation of the common law, he is bound by his election, which is determined forever."

But the New York Court of Appeals summarily held that:—

> "The judgment should be affirmed with costs. The employers' liability act (Chap. 600, p. 1748, Laws 1902) did not provide a remedy for an employee injured in the course of his employment which was exclusive or in abrogation of a right of action at common law. It gave him a right of action for such injury, which was in addition to remedies theretofore existing. The complaint in this action contained allegations appropriate to and sufficient for the statement of a cause of action at common law, and especially after the proceedings with reference to the complaint occurring at the commencement of the trial, the trial judge was justified in treating the action as one at common law."

12 L. R. A. (New Series), pp. 1039-1040.

See also the case note there and the authorities cited in it.

Likewise in England a declaration may fail to show a cause of action under a statute, and yet may state a good case, a negligent breach of duty under the unwritten law.

Parnaby vs. Lancaster Canal Co., 11 Ad. & El. 223; s. c. Nev. & P. 223; 3 Per. & Dav. 162.

III.

As to the second ground of demurrer, which refers to the statute of limitations, there is no need of discussion. After the right of action has accrued, suit may be brought:— under the Act of 1908, within two years; under the Washington code, within three years.

Robinson vs. Baltimore and Seattle Mining & Reduction Company, 26 Wash. 484.

The record proves that this suit was instituted within less than two years after the death of the plaintiff's intestate.

The judgment rendered here is manifestly wrong. As shown, it is wrong in two aspects. It ignores basic principles. No technical reason sustains it. It improperly denies redress to the injured. In effect, it exonerates the blameworthy. It should be reversed, and the circuit court of appeals directed to order that the demurrer be overruled.

Respectfully submitted,

B. C. MOSBY,
Attorney for Plaintiff in Error.

DEC 6 1912
JAMES H. McKENNEY

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 139.

WILLIAM H. WINSLOW, as Administrator of the Estate of ALBERT E. PHIPPS, Deceased,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 139.

WILLIAM H. WINFREE, as Administrator of the Estate of ALBERT E. PHIPPS, Deceased,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

The plaintiff in error, who was plaintiff below, brought this action in the Circuit Court of the United States for the Eastern District of Washington against defendant in error alleged to be a railroad company engaged in interstate commerce, and stated in the complaint: "The plaintiff finally alleges that this action is brought under the provisions of that Act of Congress, approved the 22d day of April, 1908, entitled: 'An act relating to the liability of common carriers by railroad to their employees in certain cases.'" (Transcript p. 5.) Plaintiff as administrator sued to recover for the death of Albert E. Phipps, a minor, occurring on the third day of July, 1906, nearly two years before the act of Congress was passed, from an accident while Phipps was in the service of defendant in error as locomotive fireman on one of its freight trains. Various grounds of negligence were alleged (Transcript pp. 2-5). Defendant in error, by

demurrer to the complaint, asserted that the act of Congress could not be held to apply to accidents occurring before its passage (Transcript p. 6). The Circuit Court sustained the demurrer and dismissed the action. This judgment was affirmed by the Circuit Court of Appeals of the Ninth Circuit (173 Fed. Rep. 65). The opinion in the Circuit Court is printed Transcript p. 7 and the opinion in the Circuit Court of Appeals Transcript p. 19.

Waiving all inquiry as to whether Congress *might* have made the act applicable to accidents occurring before its passage (as to which it must be admitted there is at least grave doubt) there seems an entire absence in the act of Congress of any expression of intent to make the act retroactive. The language of the first section is that railways *"shall be liable"* to their employes as stated. Nothing need be added to what the Circuit Court of Appeals said in disposing of this question.

> "There is nothing in the terms of the Act to show that it was the intention of Congress to affect rights of parties as to any injury or death that had occurred before it went into effect. It is not to be presumed that Congress intended to impose civil liability upon carriers founded upon transactions which, at the time of their occurrence, gave no rise to a legal demand against them. In *Twenty Per Cent Cases*, 20 Wall. 179, 187, the court said: 'Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule, courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language

of the new provision which shows that they were intended to have a retroactive action.' The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the courts, such as statutes intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof. It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred. In *Society, etc., vs. Wheeler et al.*, 2 Gall. 104-139, Judge Story said: 'Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective: and this doctrine seems fully supported by authorities.' Tested by these principles it seems clear that the Act of 1908 is in none of its features retroactive."

Should it be contended that the complaint sets out a cause of action independent of the Act of Congress, two good answers may be made:

(a) It is plain from an examination of the complaint that the plaintiff did not intend to allege a cause of action independent of the act, because he took pains distinctly to allege that the action was brought under the provisions of the act of Congress. This was one of the grounds which the complaint set forth as a basis

for the jurisdiction of the Circuit Court. The complaint also alleged that the plaintiff was a citizen of Washington and the defendant a corporation of the State of Wisconsin and, this being the fact, the defendant, without its consent, could not be sued in the Circuit Court of the United States for Washington: *In re Moore*, 209 U. S. 490; *Western Loan and Savings Company vs. Butte and Boston Consolidated Mining Company*, 210 U. S. 368. The defendant might not have consented to be sued in the federal court in Washington, on a cause of action resting wholly or partly on State of Washington statutes. It might with reason have preferred to have those statutes construed and applied by the State Courts, while there would have been little reason for it to object to be sued in the federal court on the act of Congress, inasmuch as all questions arising under that act, being federal questions, would be open to ultimate review in the courts of the United States whether the trial was in the federal court or a state court. The defendant had a right to rest on the assurance that the action was grounded on the act of Congress and, having taken its position and tried the case on that basis, the plaintiff cannot after the trial change his position. From the opinion of the trial court (Transcript p. 7) it seems clear that there was no contention on the trial that the action was grounded on the law of the state. The opinion of the Circuit Court of Appeals shows that such a contention was advanced in that court, but it would appear from the record to have been advanced there for the first time. Plainly the demurrer (Transcript p. 6) treated the action as based wholly on the act of Congress. The plaintiff in error did not amend his complaint, or suggest that he asserted any right under state statutes or under

general law. He argued the demurrer as presented and submitted to judgment thereon which he appealed. Plainly a contention now that the complaint might be sustained as brought upon statutes of the state is an afterthought and should not be entertained. Moreover, if the action is grounded on State law, the jurisdiction of the Circuit Court rested entirely on diverse citizenship, and the decision below is final. But the plaintiff's writ of error to this court is grounded wholly on the action being based on a federal statute.

(b) The law of the State of Washington stands thus: By Section 4829, Ballinger's Code, a father or mother may maintain an action for injury or death of a child. By a statute subsequently passed (Section 4828, Ballinger's Code) an action is given to the personal representatives or heirs to recover for negligent death. The Supreme Court of Washington held in *Hedrick vs. Ilwaco Ry. & Nav. Co.*, 4 Wash., 400, that these sections created distinct causes of action; one maintainable only by the parents, in which damages could be recovered for their loss resulting from the infant's death; the other maintainable only by the personal representative or heir, in which damages could be recovered only for injury accruing to the estate of the infant after he would have attained majority. The plaintiff's complaint shows damages to the parents by loss of the infant's prospective wages and funeral and other expenses, and in paragraph XX alleges that by reason of the negligent acts resulting in the death of their son the parents of deceased have been grievously damaged. The complaint fails to set forth any damage to the estate of the infant such as could be sued for by an administrator and sets forth only the damage recoverable under Section 4829 of the Code, which does not accrue to a personal representative.

Atrops vs. Costello, 8 Wash. 149; *Noble vs. Seattle,* 19 Wash. 133; *Manning vs. Tacoma R. & P. Co.,* 34 Wash. 406. Therefore, as the Circuit Court of Appeals held, the action pleaded could not, under the laws of Washington, have been maintained by the administrator; and this reinforces the conclusion that the action was planted on the act of Congress alone.

It is hardly necessary to point out that the act of Congress of June 11, 1906, cannot aid the plaintiff, both because that act was unconstitutional (*Employers' Liability Cases,* 207 U. S. 463) and because the action was not brought within one year from the injury as thereby required. One of the grounds of demurrer was that the action was not commenced within the time limited by law.

CHARLES W. BUNN.

WINFREE, AS ADMINISTRATOR OF PHIPPS, v. NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 139. Submitted January 23, 1913.—Decided February 24, 1913.

While there are exceptions, especially in the case of remedial statutes, the general rule is that statutes are addressed to the future and not to the past; and, in the absence of explicit words to that effect, statutes are not retroactive in their application.

The Employers' Liability Act of 1908 introduced a new policy and radically changed existing law and will not be construed as a remedial statute having retrospective effect.

An action brought under the Employers' Liability Act of 1908 by the personal representative of the person who was killed prior to the passage of the act cannot be sustained as stating a cause of action under the law of the State, where that law gives the action to the parents.

Damages to the estate of one killed by negligence is a distinct cause of action, under the laws of the State of Washington, from damages to the parents of the person so killed.

173 Fed. Rep. 65, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and whether it had a retroactive effect, are stated in the opinion.

Mr. B. C. Mosby for plaintiff in error:

The act was retroactive. It is a remedial measure, designed to supply a remedy for wrongs for which the law had offered no adequate redress or, as in the case at bar, no redress whatever.

If the meaning of the statute were doubtful, judicial construction ought not to lean towards the wrongdoer but should rather give the benefit of the doubt to the victims of the wrong. There is no sound reason to favor the common carrier. *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 448; *Spain* v. *St. L. & S. F. R. Co.*, 151 Fed. Rep. 529; *Hayes* v. *Williams*, 17 Colorado, 467; *Employers' Liability Cases*, 207 U. S. 447.

To correct the imperfections of the former act, Congress passed the act of 1908. The second is, like the first, clearly remedial, and should accordingly receive a catholic construction. 36 Cyc. 1173, 1174, 1188; 13 Cyc. 312, n. 9; 1 Chitty's Blackstone's Comm., 19th London ed., side p. 88, n. 30; Black's Const. Prohibitions, 1st ed., 1887, § 134, p. 160; 2 Lewis' Suth. Stat. Const., 2d ed., 1904, pp. 643, 1291, § 519; *Stewart* v. *Balt. & Ohio R. R. Co.*, 168 U. S. 448; *Soule* v. *New York &c. R. R. Co.*, 24 Connecticut, 575; *Lamphear* v. *Buckingham*, 33 Connecticut, 237; *Wabash R. R. Co.* v. *Shacklett*, 10 Ill. App. 404; *Merkle* v. *Bennington*, 58 Michigan, 156; *Bolinger* v. *St. Paul R. R. Co.*, 36 Minnesota, 418; *Vance* v. *Southern R. R. Co.*, 138 N. C. 839; *Haggerty* v. *Central R. R. Co.*, 31 N. J. L. 349; *Beach* v. *Bay State Co.*, 27 Barb. (N. Y.) 248.

The act of 1908, being then of a remedial nature, should be construed as retroactive if such construction is not precluded by its terms. *Larkins* v. *Saffarans*, 15 Fed. Rep. 147. Its terms, however, so far from precluding that

construction rather force it. 36 Cyc., p. 1209, 1213; Wade on Retroactive Laws, 1st ed., § 24; Myer on Vested Rights, 1st ed., 1891, § 25, p. 18; Black on Interp. Laws, 1st ed., 1896, p. 261; Black's Const. Prohib., 1st ed., 1887, pp. 176, 276, 277.

See also: 8 Cyc., p. 910, n. 68; p. 1021, n. 62; *Jefferson City Light Co.* v. *Clark*, 95 U. S. 644; *Lycoming* v. *Union County*, 15 Pa. St. 166; *Barbour* v. *Horn*, 48 Alabama, 659; *Sedgwick County* v. *Bunker*, 16 Kansas, 498; *Plummer* v. *Northern Pacific Railway Co.*, 152 Fed. Rep. 206.

Remedial statutes were retroactively applied in actions for injuries in *Chapman* v. *State*, 104 California, 690; *Cannon* v. *Rowland*, 34 Georgia, 422; *Bevier* v. *Dillingham*, 18 Wisconsin, 556; *Rouge* v. *Rouge*, 36 N. Y. Supp. 436; *Brower* v. *Bowers*, 1 Abb. Dec. 214; *Kuehn* v. *Paroni*, 20 Nevada, 203.

The act of 1908 is shown, by its entire phraseology, to relate to past as well as to future occurrences. *Sohn* v. *Waterson*, 17 Wall. 599.

The limitation of two years is an extension of the one year period provided by the act of 1906. Thus an evident purpose of Congress in its later legislation was to save the rights of those persons whose suits had abated in consequence of the decision in the *Employers' Liability Cases*, 207 U. S. 463.

Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof. *United States* v. *Bowen*, 100 U. S. 508; *Viterbo* v. *Friedlander*, 120 U. S. 707; *People* v. *Essex County*, 70 N. Y. 236; *People* v. *Columbia County*, 43 N. Y. 132.

The rule against retrospective operation of law allows the introduction of remedies where none existed before, and their equitable application to existing causes of action. Cooley, Const. Lim. 347, 436, 442, 454, 477, 478; 1 Hare Const. Law, 421; *Gage* v. *Gage*, 66 N. H. 294; *Milne* v. *Huber*, 3 McLean, 217.

The legislature cannot make contracts for individuals, and they cannot impose an obligation which does not equitably arise out of the transaction. But they may give a remedy where there is none, and where in good conscience there should be one. A remedy being general applies to previous as well as subsequent cases.

As to contention of defendant in error that to apply the act of 1908 in the present instance, would be to destroy vested rights of the railway company, under the common law, see *Second Employers' Liability Cases*, 223 U. S. 50, holding that a person has no property, no vested interest, in any rule of the common law; *Walker* v. *Ware, Hadham &c. Rail Co.*, 12 Jur. (N. S.) 18; Cooley, Const. Lim., 6th ed., p. 438; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

Under the rule of *stare decisis*, this case is disposed of by *Phil. Balt. & Wash. R. R. Co.* v. *Schubert*, 224 U. S. 603.

In the case at bar, the complaint alleged, *inter alia*, that on the part of the deceased there was no contributory negligence and no assumption of risk. Neither of these allegations was controverted. There was no answer of any kind. Yet the district judge considered that the facts were just the opposite of what was alleged. At least for the purposes of the demurrer, the complaint should have been taken as true.

The ruling of the district court was based upon matter not simply *dehors* the record but contrary to the record.

Irrespective of the act of Congress, implied contracts disregarding comparative negligence in cases of homicide should be deemed void as in contravention of public policy. 26 Cyc., pp. 609, 1094.

Apart from the act of 1908, the complaint presents a case for Federal cognizance. It states a cause of action under the statutes of the State of Washington, but not under the common law. Also that plaintiff in error is a citizen of the State of Washington; the parents of the decedent are citizens of the State of Wyoming; the de-

fendant in error is a corporation resident in the State of Wisconsin; and the amount involved in the action exceeds $2,000, exclusive of interest and costs.

Under the laws of Washington, when the death of a minor has been caused by wrongful act, the father may compel compensation for the loss of the child's services, but he cannot recover a solatium. *Noble* v. *Seattle*, 19 Washington, 133.

The compensation received, however, belongs, under the community system, to the mother as well as to the father. 2 Rem. & Bal. Code, § 5917. See also *Kleps* v. *Bristol Manfg. Co.*, 81 N. E. Rep. 765.

In England a declaration may fail to show a cause of action under a statute, and yet may state a good case, a negligent breach of duty under the unwritten law. *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El. 223; *S. C.*, Nev. & P. 223; 3 Per. & Dav. 162.

Mr. Charles W. Bunn for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, by plaintiff in error (herein referred to as plaintiff) as administrator of the estate of Albert E. Phipps, deceased, against defendant in error (herein referred to as defendant) for the wrongful death, it is alleged, of Albert E. Phipps, a minor, of the age of eighteen years and five months, while acting as fireman upon a freight locomotive of the defendant in the State of Washington. The negligence of defendant is alleged and that defendant was engaged in interstate commerce; that decedent had not been emancipated nor had his parents knowledge of his employment; that they lived in the State of Wyoming

and that the action was brought for their benefit under the provisions of the act of Congress of April 22, 1908, (35 Stat. 65, c. 149), entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases."

Defendant demurred to the complaint on the ground, among others, that the act of Congress upon which plaintiff relied was passed, approved and became a law after plaintiff's alleged cause of action accrued and imposed no liability, therefore, on defendant by reason of the facts set forth in the complaint. The demurrer was sustained, and, plaintiff refusing to plead further, judgment was entered dismissing the complaint and for costs. The Court of Appeals affirmed the judgment. 173 Fed. Rep. 65.

Plaintiff, to support his contention that the act of Congress has retroactive operation, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them, it is contended, to the past as well as to the future. The Court of Appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application were "such as were intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof." It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress and the act has only given a more efficient and

a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it, and we may quote from its opinion (173 Fed. Rep. 66): "It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred." Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.

It is contended that apart from the act of Congress the complaint "states a cause of action under the statutes of the State of Washington." This does not avail plaintiff. He admits that the statutes of Washington give the right of action to the father of the deceased minor, not to a personal representative. He, however, to justify his right of action says that the compensation recovered in an action by the father of the minor belongs under the community system to the mother as well as to the father. But we are not informed how this, if true, gives a right of action in the administrator of the minor's estate. Damages to his estate would be a distinct cause of action from damages to his parents. *Hedrick* v. *Ilwaco Ry. & Nav. Co.*, 4 Washington, 400.

Judgment affirmed.